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CXA

STATES  
APPEAL

IN THE COURT OF APPEALS OF THE STATE OF OREGON

In the Matter of the Guardianship and )  
Conservatorship of Phyllis M. Symons, ) Multnomah County Circuit Court  
a Protected Person. ) Case No. 020791261  
)  
STATE OF OREGON, Long Term Care ) CA 152489  
Ombudsman, )  
)  
Appellant, )  
)  
v. )  
)  
PHYLLIS M. SYMONS and MOLLY )  
K. SMITH, )  
)  
Respondents. )

RESPONDENT MOLLY K. SMITH'S RESPONSE BRIEF

Appeal for the Judgment of the Circuit Court  
for Multnomah County  
Judge Paula J. Kurshner

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March 2013

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## **STATEMENT OF THE CASE**

### **A-D. Nature of the Proceeding; Nature of the Order to Be Reviewed; Statutory Basis of Jurisdiction and Appeal; Effective Dates for Appeal**

Appellant's statements are correct.

### **E. Questions Presented on Appeal**

1. Did the trial court abuse its discretion in denying LTCO's petition to compel the guardian to provide LTCO more information than ORS 125.320 required the guardian to provide in changing Phyllis Symons's placement?
2. Did the trial court abuse its discretion in denying LTCO's petition for information about Phyllis Symons's location, when the trial judge found that Phyllis Symons's incapacity, cognitive impairment and communication deficits meant that she could neither communicate complaints to LTCO nor understand LTCO's report of its investigation?
3. Did the trial court abuse its discretion in denying LTCO's petition for information about Phyllis Symons's location, when the trial judge explicitly found that Phyllis Symons's welfare was fully protected by her lawyer, her guardian, and the Court Visitor?
4. Did the trial court abuse its discretion in denying LTCO's petition for information about Phyllis Symons's location when the trial court found that LTCO's involvement posed a risk of harm to Phyllis Symons?

## F. Summary of Argument

The trial court was not obligated as a matter of law to place LTCO's interests above the welfare of the protected person, and did not abuse its discretion when it denied LTCO's petition to compel disclosure of the protected person's specific location.

ORS 125.320 requires the guardian to give notice of intent to change a protected person's placement, but the statute does not require the notice to include the protected person's physical address. The purpose of that notice is to allow interested persons the opportunity to object to a change of placement that would be more restrictive of the protected person's civil liberties. Here, LTCO wanted the notice given to it to include Phyllis Symons's location, *not* so it could object to that placement – which was no more restrictive than the previous one – but instead so it could fulfill its own statutory duties which are independent of ORS Chapter 125. The guardian did not breach her obligations in failing to provide that information on LTCO's demand, and the trial court did not abuse its discretion in declining to require the guardian to provide it.

In a protective proceeding under ORS Chapter 125 the trial court has enormous flexibility to craft policies and procedures for protection of incapacitated persons. The Court's highest obligation when it acts in its *parens patriae* capacity

is to do just that – to protect those people subject to the court’s jurisdiction. Here, the court fulfilled its obligation when it denied LTCO’s petition, in light of the court’s findings that LTCO’s contact with Phyllis Symons constituted a risk of harm to her, that Phyllis Symons cannot communicate or understand LTCO’s communications with her, and that Phyllis Symons was appropriately protected by her highly-qualified guardian, her court-appointed attorney, and the statutorily-appointed Court Visitor. The statutory obligations that ORS Chapter 441 imposes on LTCO are not imposed on the trial judge, and the trial court was not obligated as a matter of law to facilitate LTCO’s performance of its duties.

#### **G. Statement of Facts**

Judge Susan Svetkey retained jurisdiction over this case through a March 10, 2011 Limited Judgment after an in-chambers conference on February 25, 2011. CR 192. In her oral findings the trial judge referred to her familiarity with the case from those proceedings. TR 35:12-14.

The appointed Court Visitor, Dr. Polly Fisher, provided the court with a detailed letter of January 25, 2012, in which she analyzed the various claims of abuse of Phyllis Symons that were made when she was at her previous placement,

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the Gocan Care Home. CR 208, SER 3-8. In that letter, Dr. Fisher explained how previous communications have caused agitation and stress for Ms. Symons.

Saying they have received explicit information from Phyllis [the Gocans] have made complaints about people who have been important in her life, alienating her from those people. Well intentioned but uninformed people (paraprofessionals, advocates and professionals with limited understanding), have become involved as a result of complaints voiced by the Gocans believing that Ms. Symons was being abused or mistreated. As I and others have observed firsthand, there are no boundaries in the home and Phyllis hears the dramatic litany of the bad things others have done to her. When ombudsmen, APS, or others concerned for her welfare come to investigate, Phyllis is the center of attention and agrees with the storyline she has been given.

SER 4.

Dr. Fisher's July 20, 2012 letter was a supplemental report aimed directly at the issues raised in LTCO's Petition; it was received in evidence as Ex. 101. CR 224, SER 1-2. Dr. Fisher's findings in her July 20 report mirrored those of the January 25 report:

Ms. Symons is very easily emotionally manipulated and is unable to communicate beyond a very basic level. When seen alone, Ms. Symons presents with unclear and inconsistent communication and is not able to demonstrate that she understands even basic information and questions. She is aphasic both in receiving and transmitting verbal information (receptive and expressive). Her communication is nonverbal and primarily hand gestures. Assessments by Speech Therapy have been that the meanings of her gestures change, making them unclear. She is not capable of abstraction. Of note are her deficits in executive functioning that cause her to be impulsive and to use poor judgment. Ms. Symons has a presentation that masks some of her deficits and she engenders sympathy. She appears aware and alert and



she makes valiant efforts to communicate. She is very sensitive to responding in a way to please or mimic others, as the Gocans demonstrated. I do not see how she can provide a reliable information about an “ongoing investigation”.

SER 2.

In her July 20 report, Dr. Fisher agreed that the guardian’s efforts to protect Ms. Symons by restricting LTCO’s access to her were appropriate. Dr. Fisher concluded, “the involvement of the Ombudsman in the past has escalated Ms. Symons emotionally and has been expensive.” SER 2.

In making its ruling the trial court “put tremendous weight on Dr. Fisher’s perceptions and reports and recommendations.” TR 35:14-16.

## **H. Response to Assignment of Error**

### *1. Preservation of Error*

Appellant’s claim of error is preserved.

### *2. Standard of Review*

Appellant correctly states the standards of review for factual findings and conclusions of law. However, LTCO assigns error to the court’s denial of LTCO’s Petition, and that decision is reviewed for abuse of discretion.<sup>1</sup>

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<sup>1</sup> LTCO contends *State v. B.B.*, 240 Or App 75, 77, 245 P3d 697 (2010) means that the standard of review of a trial court’s “dispositional conclusions” is for error of law. That is correct only in *B.B.*’s context of civil commitment under ORS Chapter 426, where the state must prove, by clear and convincing evidence, that a respondent has a “mental disorder” that is likely to cause serious physical

### 3. *Argument*

LTCO has no right as a matter of law under ORS Chapter 125 to notice of the physical location of the protected person. It is entitled under ORS 125.060(3) to receive notice of an intended change of placement, but that statute's plain language does not require disclosure of the protected person's location. LTCO asked the court to force the guardian to provide it more information than the statute required, and the trial court did not abuse its discretion in declining to do so.

The trial court made three findings, any of which was independently sufficient to justify its refusal to grant Appellant's requested relief: (1) Phyllis Symons is functionally unable to communicate or receive communications, (2) Phyllis Symons might suffer harm should LTCO be granted access to her, and (3) Phyllis Symons has in place existing "layers of protection" which make LTCO's involvement unnecessary.

#### **a. ORS 125.320 gives LTCO no right to the specific location of the protected person's new placement**

ORS 125.320(3)(a) provides the required content of a notice to change placement: "[b]efore a guardian may place an adult protected person in a mental

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harm. This is a "rigorous threshold." *B.B.*, 240 Or App at 82-83. However, in a protective proceeding like this one under ORS Chapter 125, where Phyllis Symons was *already* subject to the jurisdiction of the court, the trial court has a free hand to manage the proceeding for the protection of the person subject to guardianship. See discussion at H.3.c.

health treatment facility, a nursing home or other residential facility, the guardian must file a statement with the court informing the court that the guardian intends to make the placement.” ORS 125.320(3)(c) then sets forth the person to whom notice must be given. Nothing in the statute requires the guardian to include in the notice the specific location of the placement. The Legislature knows how to require disclosure of the protected person’s location: *contrast* ORS 125.055(2)(a), requiring such a statement in the petition initiating a protective proceeding. ORS 174.010 prohibits engrafting onto ORS 125.320’s notice of intent to change placement a disclosure requirement that the Legislature omitted.

**b. The trial judge is not obligated to facilitate LTCO’s satisfaction of its statutory obligations**

This is separation-of-powers 101: ORS Chapter 441 imposes obligations on LTCO. It imposes no such obligations on the judiciary. The trial court need not shape its orders to serve a state agency’s performance. Indeed, in guardianship proceedings the judiciary acts in its *parens patriae* function to protect those who cannot protect themselves, and the court’s obligation is to the protected person, not to any arm of the executive branch.

LTCO faults the trial court for not grounding its ruling in the federal and state statutes that create and obligate LTCO. Opening Brief, p 23. This misses the

point: those statutes<sup>2</sup> explain why LTCO took the position it took, even in the face of evidence that its involvement was futile, was unnecessary for Phyllis Symons's protection, and in fact could do her harm. But explaining why LTCO was in court is different from explaining why the trial judge erred.

**c. The trial court has broad discretion in shaping procedure in protective proceedings**

The Legislature has conferred upon the trial court the broadest possible discretion in proceedings under ORS Chapter 125: “the court may act upon the petition or motion of any person or upon its own authority at any time and in any manner it deems appropriate to determine the condition and welfare of the respondent or protected person \*\*\*.” ORS 125.025(1). That discretion includes the power to modify any required notice allowed or required by ORS Chapter 125. *E.g.*, ORS 125.065(4) (court may alter notice required for petition); ORS 125.075(5) (court may alter notice required for filed objections). The court may modify the powers or authority of the fiduciary. ORS 125.085(3). The court has “own motion” authority to appoint counsel for the protected person (ORS 125.080(4)), to modify or terminate the proceeding (ORS 125.085(3)), or to enter any other protective order (ORS 125.010(4), ORS 125.650). In all of these powers,

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<sup>2</sup> On appeal, LTCO pulls back the curtain and admits that its actions in this case are driven by its need to maintain federal funding. *See* Opening Brief, p 33.

the trial court is generally bound by considerations of the protected person's welfare. ORS 125.300(1):

A guardian may be appointed for an adult person only as is necessary to promote and protect the well-being of the protected person. A guardianship for an adult person must be designed to encourage the development of maximum self-reliance and independence of the protected person and may be ordered only to the extent necessitated by the person's actual mental and physical limitations.

All of the trial court's powers, and its exercise of those powers, are shaped by the guiding principle that the court itself is charged to protect the person subject to its jurisdiction. As here, that protective power extends even to protection from arms of the executive branch, such as LTCO.

**d. Any of the trial court's factual findings was independently sufficient to justify denial of LTCO's Petition**

The trial court gave three different factual justifications for denial of LTCO's petition: the futility of LTCO's "reporting" to Ms. Symons in light of her inability to communicate<sup>3</sup>; the stress and agitation that LTCO's involvement causes her and

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<sup>3</sup> LTCO contends its obligation to report the results of an investigation "does not – and should not – turn on the individual facts of a case." Opening Brief, p 26 fn 4. So, LTCO would take the same position if Phyllis Symons was incapable of communication because she was in a coma; it would take the same position even if contact with the Ombudsman was *medically more probable than not* to cause her a heart attack or seizure. In fact, LTCO argues that the "shall" language of ORS 441.121 would still *require* it to report, and thereby cause harm to Ms. Symons. This vividly illustrates how LTCO's interests differ from those of the guardian and the trial court. The trial court and guardian serve the protected person, and LTCO serves its enabling statutes.

has caused in the past; and the “layers of protection” that are already in place for Ms. Symons’s protection. Crucially, all of these findings were guided by the “great weight” that the court put on Dr. Fisher’s reports, which were in the court file and received without objection. While it now seeks to quibble with some of Dr. Fisher’s analysis and conclusions (Opening Brief, p 26-27 fn 4), LTCO has not sought *de novo* review. Opening Brief, p 16.

### **I. Conclusion**

The trial court’s Order denying LTCO’s Petition was a proper exercise of its discretion. This court should affirm.

Respectfully submitted this 14<sup>th</sup> day of March, 2013.

/s/ Matthew Whitman

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Attorney for Respondent Molly K. Smith,  
Guardian for Phyllis Symons

/// /// ///

### STATEMENT OF COMPLIANCE WITH ORAP 5.05(2)(b)(i)

I certify that I have run the word count function in my word processor (WordPerfect 13) on the body text (excluding cover page, table of contents, table of authorities, this Certification, and the Certificate of Service) of Respondent's Response Brief and that the text contains 2,320 words, within the 14,000 word limitation of ORAP 5.05(2)(b)(i).

I further certify that the size of type is not smaller than 14 point for both body text and footnotes.

*/s Matthew Whitman*

---

Matthew Whitman, OSB No. 98376  
Of Attorneys for Respondent Molly K.  
Smith, Guardian for Phyllis Symons

### CERTIFICATE OF SERVICE

I certify that I served Respondent's Response Brief and Supplemental Excerpt of Record on the 14<sup>th</sup> day of March, 2013, on:

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DATED this 14<sup>th</sup> day of March, 2013.

*/s Matthew Whitman*

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